Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
Framework for Broadband Internet Service	)	GN Docket No. 10-127

COMMENTS OF U.S. TELEPACIFIC CORP. AND MPOWER COMMUNICATIONS CORP., BOTH D/B/A TELEPACIFIC COMMUNICATIONS

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U.S. TelePacific Corp. and Mpower Communications Corp., both d/b/a TelePacific Communications respectfully submit these comments in response to the Notice of Inquiry issued by the Commission in the above-referenced proceeding.[1]

I. INTRODUCTION AND SUMMARY

U.S. TelePacific Corp, and Mpower Communications Corp. both doing business as TelePacific Communications ("TelePacific") are telecommunications carriers that provide facilities-based business communications services, including local, long distance, high speed data and Internet services, to small-to-medium sized businesses and non-commercial enterprises in California and Nevada.

TelePacific supports the Commission's proposal, set forth in the *NOI*, to classify the transmission component of broadband internet service ("Internet connectivity") as a telecommunications service and contemporaneously forbear from those aspects of Title II regulation that

[1] *Framework for Broadband Internet Service*, GN Docket No. 10-127, Notice of Inquiry, FCC 10-114 (rel. June 17, 2010) ("*NOI*").

would unnecessarily burden competition in the broadband internet market.[2] The Commission must, however, tread carefully when implementing this revised regulatory framework for broadband internet services so that it avoids unnecessarily complicating the Commission's duties with respect to implementing Section 251 of the Act and that section's mandate for the Commission to promote competition through interconnection and mandatory unbundling for incumbent LECs. This is of critical importance because the facilities used to provide broadband internet service are the same facilities to which the ILECs are obligated to provide CLECs access under § 251(c)(3) of the Act as UNEs, and the same facilities CLECs and other competitors obtain under the ILECs' special access tariffs. While the *NOI* states the Commission's intent to keep intact the ILECs' obligations pursuant to Section 201 that would encompass their special access services,[3] no such statement can be found regarding Section 251 and its core interconnection and unbundling provisions. To that end it is critical that the Commission ensure that its rules and decisions implementing its revised regulatory approach clearly articulate the intent that nothing in this approach will alter competitors' existing statutory right to obtain cost-based interconnection and access to network elements from incumbent LECs.

Second, the Commission should focus narrowly on the re-classification matter and any associated forbearance and not rule out the possibility of imposing new unbundling obligations on ILEC broadband transmission services and facilities.

Finally, the Commission, must, in classifying certain broadband providers as "facilities-based" (*see e.g. NOI* ¶ 106) classify providers that rely on ILEC inputs (including UNEs and/or tariffed special access services) for last mile access as "facilities-based" for purposes of its regulatory regime. Treating competitors that use UNEs or special access as last mile inputs as

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[2] *See e.g. NOI*, ¶ 68.

[3] *See e.g. id.* ¶¶ 75-76.

non-facilities based providers could create distortions in the retail market for Broadband Internet service.

II. THE COMMISSION SHOULD EXPLICITLY STATE THAT IT DOES NOT INTEND TO ALTER ILECS' EXISTING UNBUNDLING AND INTERCONNECTION OBLIGATIONS PURSUANT TO SECTIONS 251 AND 252

The Commission, at a minimum, must make clear its intention that nothing in its revised regulatory framework alters the statutory obligations of ILECs regarding interconnection and access to unbundled network elements. The Commission has made similar statements in previous orders that have sought to relieve ILECs of certain regulatory obligations associated with their broadband services and it should do so again.

Such a statement is critical because the networks that ILECs use to provide broadband internet service are the same networks they use to provide UNEs and special access services to competitors.[4] The Commission's classification decision, and any associated forbearance must remain grounded in this fact. The Commission's classification and associated forbearance decisions must consider the impact of a revised regulatory framework on existing regulatory obligations governing all the retail and wholesale services provided over the network.

In particular, any forbearance associated with reclassification of Internet connectivity service should be carefully tailored so that it does not impact the ILECs' existing statutory obligations to provide non-discriminatory access to their network under § 251, § 256 and § 271 or to provide services such as special access pursuant to § 201 and associated Commission rules.

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[4] *See Connecting America: The National Broadband Plan* p. 59 (rel. Mar. 16, 2010) ("*Plan*" or "*Broadband Plan*") ("Increasingly, broadband is not a discrete, complementary communications service. Instead, it is a platform over which multiple IP-based services—including voice, data and video—converge").

In *the Wireline Broadband Order*,[5] for example, the Commission clearly stated that nothing in that Order "changes requesting telecommunications carriers' rights to access unbundled network elements (UNEs) under section 251 and [the FCC's] related implementing rules."[6] The Commission explained that "regardless of how the Commission classifies wireline broadband Internet access service, including its transmission component, competitive LECs should still be able to purchase UNEs, including UNE loops to provide stand-alone DSL telecommunications service, pursuant to section 251(c)(3) of the Act."[7]

Further, the *Wireline Broadband Order* explained that the pivotal analysis in determining whether a CLEC could obtain access to a UNE was whether the CLEC would be using that UNE to provide a telecommunications service, without regard to how the ILEC uses that same element.[8] The Commission thus held that "competitive LECs will continue to have the same access to UNEs, including DS0s and DS1s, to which they are otherwise entitled under our rules, regardless of the statutory classification of service the incumbent LECs provide over those facilities."[9] The Commission has made similar statements in other orders where it has scaled back the

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[5] *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities,* 20 FCC Rcd 14853 (2005), *aff'd sub nom. Time Warner Telecom, Inc. v. FCC*, 507 F.3d 205 (3d Cir. 2007) ("*Wireline Broadband Order*").

[6] *Id.* at 14859, ¶ 6; *see also id*. at 14861 ¶ 9 n.21 ("this Order does not disturb incumbent LECs' unbundled network element (UNE) obligations or competitive carriers' rights to obtain UNEs"); at 14868 ¶ 24 n.64 ("the decisions contained in this Order have no affect on section 251(c) obligations of incumbent LECs, including UNE availability issues as reflected in [the FCC's] *Triennial Review* proceeding"); at 14883 ¶ 54 n. 157 ("the decisions contained in this Order have no affect on competitive LECs' ability to obtain UNEs, or on the section 251(c) obligations of incumbent LECs.").

[7] *Id.* ¶ 126.

[8] *Id*. ¶ 127 (FCC rules "look at what use a competitive LEC will make of a particular network element when obtaining that element pursuant to section 251(c)(3); the use to which the incumbent LEC puts the facility is not dispositive").

[9] *Id*. at ¶ 127.

ILECs' unbundling obligations,[10] and it should make similar declarations in whatever orders it issues in this proceeding.

III. THE COMMISSION NEED NOT AND SHOULD NOT FORBEAR FROM SECTIONS 251 AND 252

Significantly, the Commission does not need to and should not forbear from section 251 primarily because, under the Commission's current regulatory framework, the impact of section 251 on Internet connectivity service is limited.

A. Sections 251 and 252 have Limited Applicability to Most Broadband Providers

To begin, most of section 251 applies only to local exchange carriers, including incumbent local exchange carriers. Under the definitions in the Act, a carrier must provide either telephone exchange service or exchange access service to qualify as a LEC.[11]

The NOI does not attempt to classify Internet connectivity service as either telephone exchange service or exchange access. Nor does the Commission's classification of Internet connectivity service as a telecommunications service necessarily imply such service is either telephone exchange service or exchange access. In other words, the classification of internet connectivity service as a telecommunications service does not automatically make the provider offering such service a LEC.

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[10] *See Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c); SBC Communications Inc.'s Petition for Forbearance Under 47 U.S.C. § 160(c); Qwest Communications International Inc. Petition for Forbearance Under 47 U.S.C. § 160(c); BellSouth Telecommunications, Inc. Petition for Forbearance Under 47 U.S.C. § 160(c)*, 19 FCC Rcd 21496, 21502 ¶ 12 n.47 (2004) ("The forbearance relief granted in this Order in no way modifies the obligations of the BOCs under section 251(c) to continue to provide access to UNEs as specified in the *Triennial Review Order*"); *Petition of AT&T Inc. for Forbearance Under 47 USC Section 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services*, 22 FCC Rcd 18705, 18718 n.86 (2007); *id*. ¶ 21 n.90 ("Granting the requested relief, however, will not affect … competitors' ability to obtain traditional DS1 and DS3 …UNEs").

[11] 47 U.S.C. § 153(26).

Therefore, the Commission's revised regulatory framework does not implicate the terms of section 251(b) or (c) which govern reciprocal compensation, collocation, and unbundling at cost-based rates that the incumbents (both ILECs and MSOs) use to paint Title II as overly regulatory. Even if internet connectivity were classified as an exchange access service, the mandatory interconnection, unbundling and collocation provisions of section 251(c) would only apply to incumbent LECs — they would not apply to other broadband providers such as cable MSOs or wireless broadband providers that are not already ILECs as defined by the Act.

With respect to the ILECs, the Commission has already narrowly tailored their obligations under § 251(c) with respect to facilities that can be used by competitors to provide broadband service and the proposed reclassification of Internet connectivity services would not disturb these existing rules. For example, pursuant to its authority under § 251(d)(2)(B), the Commission has already eliminated the vast majority of the § 251(c)(3) unbundling obligations related to ILEC provision of broadband internet service by relieving ILECs of the duty to provide UNE access to fiber loops in most instances and limiting CLEC access to the packetized functionality of hybrid loops. Under the terms of the *Wireline Broadband Order*, the remaining broadband related unbundling obligations resulting from the *Triennial Review Order* and *Triennial Review Remand Order* were not affected by the classification of Internet connectivity as telecommunications instead of a telecommunications service,[12] and they should remain similarly unaffected by any ruling adopted in this docket.

B. Premature Forbearance from § 251 may Impede the Commission's Ability to Implement Aspects of the *National Broadband Plan* Regarding Competition

There is one serious gap in the *NOI*; it fails to stimulate any comments regarding whether the Commission should – or needs to – forbear from the application of section 251 of the Act

[12] *Wireline Broadband Order*, 20 FCC Rcd at 14868 ¶ 24 n.64.

with respect to Internet connectivity services offered by companies subject to section 251. TelePacific believes that the Commission need not and should not forbear from Section 251 as part of its re-classification of Internet connectivity service as a telecommunications service.

While the Commission's current unbundling analysis limits ILECs' obligations to provide access to the fiber and "packetized" facilities used to provide broadband, the National Broadband Plan questioned the coherence and effectiveness of this framework. Thus, the Plan urged the Commission to conduct a proceeding to make its wholesale access policies more coherent and to use unbundling to foster broadband deployment and adoption, including addressing problems small and medium sized business face with respect to access to affordable broadband.[13] By unnecessarily treading into forbearance from section 251 at this time, the Commission could cabin its future discretion to modify its impairment findings. This would impede its ability to faithfully implement the National Broadband Plan, including the proposal to rework the current wholesale access rules into a more coherent regulatory framework that fosters competition in the broadband market and the proposal to foster a new IP-based regime for interconnection.[14]

The *National Broadband Plan* recognizes that the Commission must foster "robust competition" for broadband services provided to "American businesses" in order to "to lay the foundation for America's broadband future."[15] The Plan further recognized the critical role "wholesale markets" play in securing robust competition for broadband services to the business sector.[16] A competitive wholesale market, where "providers of broadband services secure critical

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[13] *Broadband Plan* pp. 47-49.

[14] *Id.*

[15] *Broadband Plan* p. 47.

[16] *Id*.

inputs," is crucial because the "economies of scale, scope and density that characterize telecommunications networks" mean that "it is not economically or practically feasible for competitors to build facilities" to serve all of its actual or potential customers.[17] Therefore, "well functioning wholesale markets can help foster retail competition."[18] "[W]ell functioning wholesale markets" in markets where "economies of scale, scope and density" make new entry unlikely require effective regulatory policy.[19] The *Plan* then acknowledges that the Commission's current "regulatory approach" lacks the benefit of "a consistent, rigorous analytic framework."[20] For example, "similar network functionalities are regulated differently, based on the technology used;"[21] "some wholesale access policies vary based on … whether the facility … operates using a circuit- or packet-based mode or is constructed from copper or fiber—regardless of the economic viability of replicating the physical facility;"[22] "competitors that rely on "loops and other point-to-point data circuits… as critical inputs to retail broadband services for business" are denied access to these critical inputs because of "factors that have little bearing on the economics of facilities-based competitive entry."[23]

In order to more effectively promote competition in the market for broadband services, the *Plan* recommends the Commission "comprehensively review its wholesale competition regulations" in order to "develop a coherent and effective framework" that will "ensure widespread availability of inputs for broadband services" provided to American businesses. If the

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[17] *Id.*

[18] *Id.*

[19] *See id.*

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] *Id.*

Commission acts rashly and broadly preempts ILEC facilities used to provide Internet connectivity from the core requirements of sections 251 and 271 through its reclassification/forbearance proceeding, it jeopardizes its ability to undertake the comprehensive review and implement a coherent framework called for in the Plan. In particular, a broad overreaching forbearance for ILEC facilities used to provide Internet connectivity could hamper the Commission's ability to meaningfully evaluate the CBeyond petition for relief from certain of the Commission's unbundling restrictions.[24]

Small businesses are currently driving innovation and job creation in the United States, as they have created between 60-80 percent of the new jobs this past decade.[25] This sector of the economy produces 13 times more patents per employee than large enterprises and employs approximately 40 percent of the technical workers in the United States. Nor is it surprising that many of the great success stories of the last decade were recently small businesses, including notable companies such as Google, Yahoo, Amazon.com, EBay, Facebook and Twitter.

Premature forbearance from Section 251 could jeopardize the Commission's ability to foster competition for broadband services to this critical sector that drives economic growth in this country. Expanding the ILECs' unbundling obligations is appropriate at this time. When the Commission eliminated the ILECs' obligation to offer fiber loop facilities as UNEs, it did so in the belief that it would create incentives for ILECs to invest more in their networks and deploy new technology. The aspiration that less unbundling would result in more investment never materialized. As the Cbeyond Petition shows, ILECs are spending less now than they did before they were relieved of these unbundling obligations. Moreover, the experience of other countries

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[24] *See Cbeyond, Inc. Petition for Expedited Rulemaking to Require Unbundling of Hybrid, FTTH and FTTC Loops Pursuant to 47 U.S.C. § 251(c)(3) of the Act*, WC Docket No. 09-223 (filed 16, 2009) ("Cbeyond Petition").

[25] http://web.sba.gov/faqs/faqindix.cfm?areaID=24.

shows that requiring competitive access to fiber and hybrid loops appears to have stimulated ILEC investment rather than reduced it.

C. Policy and IP-Based Interconnection

Similarly, premature forbearance from section 251 threatens the Commission's ability to accomplish the IP interconnection goal of the *Broadband Plan*. The plan recognizes that "[b]roadband providers have begun migrating to more efficient IP interconnection and compensation arrangements for the transport and termination of IP traffic."[26] The *Plan* recognizes the central importance of interconnection "in which customers of one service provider can communicate with customers of another."[27] At the heart of this principle of interconnection is the statutory command in § 251(a) of the Act directing all telecommunications carriers to interconnect with each other, either directly or indirectly.[28]

Thus, the *Plan* urges the Commission to "maintain[]" the "principle of interconnection"[29] and in recommendation 4.10 urges the Commission "encourage the shift to IP-to-IP interconnection."[30] Section 251(a) is a useful tool to facilitate the transition and it would not make sense for the Commission to eliminate it from its tool box. This is especially important because the broadband networks that the Commission is classifying in this proceeding are "not … discrete, complementary communications service[s]" but represent the platform over which all communications services will be provided.[31] Prematurely eliminating the statutory interconnection command for the networks that will facilitate the vast majority of communications service

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[26] *Plan*, p. 149.

[27] *Id.* p. 49.

[28] 47 U.S.C. § 251(a).

[29] *Plan*, p. 49.

[30] *Id.* at Recommendation 4.10, p. 49.

[31] *See id.* p. 59.

for this nation in this century does not appear to make sense. It makes even less sense when the Commission has yet to begin its proceeding to implement the transition to IP-based interconnection. Even if the Commission is inclined to grant some forbearance from section 251(a), it should avoid doing so until it has had ample time to fully consider the implications in the context of its goals for IP-based interconnection.

IV. THE COMMISSION SHOULD CLARIFY THAT UNDER THE PROPOSED REGULATORY STRUCTURE CLECS THAT USE UNES OR SPECIAL ACCESS SERVICES AS LAST-MILE INPUTS ARE 'FACILITIES-BASED' PROVIDERS OF BROADBAND INTERNET SERVICE

Because the Commission did not define "facilities-based" in the Wireline Broadband Order, there has been confusion in the industry about what qualifies as a facilities-based provider of broadband Internet access. A stark example of such confusion is TelePacific's appeal of a Universal Service Administrative Company ("USAC") decision. Although USAC initially imposed USF on TelePacific's sale of wireline broadband Internet access based on the type of underlying transmission facility, the Wireline Competition Bureau reversed USAC's decision and found TelePacific owes no direct USF contribution.[32] The Bureau is still evaluating whether current rules require TelePacific, who owns substantial network facilities but leases the majority of its last mile loops from wholesale providers, to contribute indirectly to USF.

As TelePacific has shown, assessing USF on the T-1s used in TelePacific's broadband Internet access service but not on T-1s used in broadband Internet access service offered by an ILEC over its own T-1 loop (1) violates Section 254's requirement that contributions be equitable and nondiscriminatory, (2) contradicts the Commission's policy of a level playing field for

[32] *Request for Review of a Decision of the Universal Service Administrator and Emergency Petition for Stay by U.S. TelePacific d/b/a TelePacific Communications*, WC Docket No. 06-122, Order, DA 10-752 (rel. April 30, 2010) ("*TelePacific Order*").

all broadband Internet access services, (3) violates the policy of competitive neutrality by creating a cascading effect that imposes USF on providers of broadband Internet access services utilizing certain leased local loop facilities; and (4) violates rules governing how contributors report carrier's carrier revenue.

If contributions on broadband Internet access are necessary to ensure the sufficiency of the Fund, then the Commission should adopt rules that ensure all providers (wireline, cable, wireless, etc.), whether or not they own loop facilities, contribute on an equitable and nondiscriminatory basis. The Commission should both define "facilities-based" and ensure that the distinction between facilities-based and non-facilities-based providers does not confer a competitive advantage to any provider in the retail market for broadband Internet access service.

V. CONCLUSION

For the foregoing reasons, the Commission should reclassify Internet connectivity service as a telecommunications service subject to title II, but should not forbear from the application of Sections 251 and 252 and should expressly declare in any orders it issues in these proceedings that nothing in these decisions affects the ILECs' obligations under sections 251 and 252 or CLECs' rights under those same sections.

Respectfully submitted,

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